Supreme Court, U.S.
FILED
SEP 7 - 2004
OFFICE OF THE CLERK

No. 04 360

In The

Supreme Court of the United States

ROBERTO DARIO HERNANDEZ-GALICIA, *et al.*,

Petitioners,

v.

JOHN ASHCROFT,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

BRIAN D. LERNER
Counsel of Record
LAW OFFICES OF BRIAN D. LERNER
A PROFESSIONAL CORPORATION
249 East Ocean Blvd., Suite 408
Long Beach, California 90802
Telephone (562) 495-0554
Facsimile (562) 495-0519

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Court of Appeals below erred in its affirmance of the Immigration Judge's adverse credibility determination in the petitioners' asylum claim.

2. Whether the petitioners' rights to due process under the Fifth Amendment was violated when the Immigration Judge failed to advise the petitioners of their apparent eligibility for relief under the Convention Against Torture.

3. Whether the Court of Appeals below erred in its determination that use of the streamlining regulation by the Board in this case did not violate the petitioners' due process rights.

PARTIES TO THE PROCEEDING

In addition to Roberto Dario Hernandez-Galicia, the lead petitioner, Gladis Sonia Hernandez, Kenny Robert Hernandez-Vigil, and Kevin Jonathan Hernandez-Vigil were also named as petitioners in the underlying petition for review before the United States Court of Appeals for the Ninth Circuit.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE PETITION	5
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

Berroteran-Melendez v. INS, 955 F.2d 1251 (9th Cir. 1992) 6

De Leon-Barrios v. INS, 116 F.3d 391 (9th Cir. 1997) 6

Garrovillas v. INS, 156 F.3d 1010 (9th Cir. 1998) 6

Graham v. Richardson, 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971) 11

Gui v. INS, 280 F.3d 1217 (9th Cir. 2002) 8

He v. Ashcroft, 328 F.3d 593 (9th Cir. 2003) 5

INS v. Elias-Zacarias, 502 U.S. 478, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992) 5

Kamalthas v. INS, 251 F.3d 1279 (9th Cir. 2001) 12

Kebede v. Ashcroft, 366 F.3d 808 (9th Cir. 2004) 6

Lopez-Reyes v. INS, 79 F.3d 908 (9th Cir. 1996) 8

Mathews v. Diaz, 426 U.S. 67, 48 L. Ed. 2d 478, 96 S. Ct. 1883 (1976) 11

Shah v. INS, 220 F.3d 1062 (9th Cir. 2000) 8

Truax v. Raich, 239 U.S. 33, 36 S. Ct. 7, 60 L. Ed. 131 (1915) 11

United States v. Arce-Hernandez, 163 F.3d 559 (9th Cir. 1998) 11

United States v. Arrieta, 224 F.3d 1076 (9th Cir. 2000) 11

Vargas v. U.S. Dept. of Immigration & Naturalization, 831 F.2d 906 (9th Cir. 1987) 15

TABLE OF AUTHORITIES – Continued

Page

Wang v. Ashcroft, 341 F.3d 1015 (9th Cir. 2003) 6

Wong Wing v. United States, 163 U.S. 228, 16 S. Ct. 977, 41 L. Ed. 140 (1896) 11

Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886) 11

STATUTES

8 U.S.C. § 1252 1

28 U.S.C. § 1254(1) 1

FARRA § 2242(a), Pub.L. No. 105-277, Div. G, 112 Stat. 2681 (Oct. 21, 1998) 3

INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) 2

INA § 208(a), 8 U.S.C. § 1158(a) 2

INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) 4

OTHER AUTHORITIES

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), 23 I.L.M. 1027 (1984) 2, 3

REGULATIONS

64 Fed. Reg. 13881 (Mar. 23, 1999) 3

64 Fed. Reg. 8478 (Feb. 19, 1999) 3

64 Fed. Reg. 9435 (Feb. 26, 1999) 3

64 Fed. Reg. 56135, 56137 (1999) 15

TABLE OF AUTHORITIES – Continued

Page

8 C.F.R. § 1003.1(a)(7)(iii) 13

8 C.F.R. § 1003.1(e)(4) 13

8 C.F.R. § 1240.49(a) 11

8 C.F.R. § 208 3

8 C.F.R. § 208.16(c)(2) 12

8 C.F.R. § 208.16(c)(3) 12

8 C.F.R. § 240.11(a)(2) (1999) 4, 11

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. V 2

PETITION FOR WRIT OF CERTIORARI

The petitioners, Roberto Dario Hernandez-Galicia, *et al.*, respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The United States court of appeals' decision of April 13, 2004 (App., *infra*, 1a-3a), denying Hernandez's petition for review is unreported. Subsequently, the court of appeals' denial of Hernandez's petition for rehearing on June 9, 2004 is also unreported (App., *infra*, 31a). The Board of Immigration Appeals' (hereinafter "Board" or "BIA") decisions of September 10, 2002 are also believed to be unreported (App., *infra*, 4a-9a).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit below had jurisdiction, pursuant to 8 U.S.C. § 1252, to consider the petition for review from a final administrative order of the BIA. The Court of Appeals denied the petitioners' petition for review on April 13, 2004 and, subsequently, the petition for rehearing on June 9, 2004. Wherefore, the jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides:

> *"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."*

U.S. Const., amend. V.

2. Section 208(a) of the Immigration and Nationality Act (hereinafter "INA" or "Act"), 8 U.S.C. § 1158(a), authorizes the Attorney General, in his discretion, to grant asylum to an alien who is a "refugee" as defined in the Act, *i.e.*, an alien who is unable or unwilling to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

3. In October of 1998, Congress implemented Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

("Convention" or "CAT"),[1] through the Foreign Affairs Reform and Restructuring Act of 1998 (hereinafter "FARRA"), which states:

> *It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture. . . .*

FARRA § 2242(a), Pub.L. No. 105-277, Div. G, 112 Stat. 2681 (Oct. 21, 1998). The United States Attorney General did not promulgate regulations to implement the Convention until February of 1999, principally at 8 C.F.R. § 208. *See* 64 Fed. Reg. 8478 (Feb. 19, 1999) and the corrections at 64 Fed. Reg. 9435 (Feb. 26, 1999) and 64 Fed. Reg. 13881 (Mar. 23, 1999).

4. Relevant regulations at the time of petitioners' deportation hearing required that a person facing deportation be advised of any apparent possibility for relief from deportation:

> *(2) In conjunction with any application for creation of status of an alien lawfully admitted for permanent residence made to an immigration judge, if the alien is inadmissible under any provision of section 212(a) of the Act, and believes that he or she meets the eligibility requirements for a waiver of the ground of inadmissibility, he or she may apply to the immigration judge for*

---

[1] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), 23 I.L.M. 1027 (1984).

> *such waiver. The immigration judge* ***shall inform*** *the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and* ***shall afford*** *the alien an opportunity to make application during the hearing* [emphasis added].

8 C.F.R. § 240.11(a)(2) (1999).

STATEMENT OF THE CASE

1. The lead petitioner, Roberto Dario Hernandez-Galicia (hereinafter "Hernandez"), his wife, Gladis Sonia Hernandez, and their two children, Kenny Robert Hernandez-Vigil and Jonathan Hernandez-Vigil,[2] are natives and citizens of Peru who entered the United States on or about December 24, 1988, at or near San Ysidro, California.

2. The former Immigration and Naturalization Service (hereinafter "INS" or "Service") initiated removal proceedings against Mr. Hernandez and his family with the filing of Notices to Appear with the Immigration Court in Los Angeles on or about July 2, 1997, charging them with removability as aliens present in the United States without being admitted or paroled, or who have arrived in the United States at any time or place other than designated by the Attorney General under INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i).

[2] Because the wife and children's applications for relief are essentially derivative of that of Roberto Dario Hernandez-Galicia, the lead petitioner, all references to Mr. Hernandez from hereon will, unless otherwise stated, apply to them as well.

3. On July 7, 1999, the Immigration Judge (hereinafter "IJ") in Los Angeles, California, denied the couple's applications for asylum and withholding of removal based upon an adverse credibility determination, but granted voluntary departure. App., *infra*, 10a-30a.

4. A timely appeal was filed with the Board which, on September 10, 2002, affirmed, without opinion, the results of the IJ's decision below. App., *infra*, 4a-9a.

5. Subsequently, Mr. Hernandez timely petitioned the U.S. Court of Appeals for the Ninth Circuit for review of the Board's decision. On April 13, 2004, the Court of Appeals denied the petition for review, finding the IJ's adverse credibility determination to be supported by substantial evidence in the record. App., *infra*, 1a-3a.

6. Mr. Hernandez's subsequent petition for rehearing was denied by the Court of Appeals on June 9, 2004. App., *infra*, 31a.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS ERRED IN ITS AFFIRMANCE OF THE IJ'S ADVERSE CREDIBILITY DETERMINATION.

The BIA's determination that an alien is not eligible for asylum must be upheld if "supported by reasonable, substantial, and probative evidence on the record considered as a whole." *INS v. Elias-Zacarias*, 502 U.S. 478, 481, 112 S. Ct. 812, 815, 117 L. Ed. 2d 38 (1992). Although the Ninth Circuit reviews credibility findings under the deferential "substantial evidence" standard, *He v. Ashcroft*, 328 F.3d 593, 595 (9th Cir. 2003), such findings "must be supported

by a specific, cogent reason." *De Leon-Barrios v. INS*, 116 F.3d 391, 393 (9th Cir. 1997) (quoting *Berroteran-Melendez v. INS*, 955 F.2d 1251, 1256 (9th Cir. 1992)).

A. THE COURT OF APPEALS FAILED TO FOLLOW ITS OWN PRECEDENT, AND THEREBY ERRED, IN ITS FINDING THAT THE EVIDENCE SUPPORTS A DECISION THAT THE INCONSISTENCIES IN THE PETITIONER'S TESTIMONY INDICATE THAT HE WAS NOT CREDIBLE.

"[I]nconsistencies of less than substantial importance for which a plausible explanation is offered" cannot serve as the sole basis for a negative credibility finding. *Garrovillas v. INS*, 156 F.3d 1010, 1014 (9th Cir. 1998); *see also Wang v. Ashcroft*, 341 F.3d 1015, 1022 (9th Cir. 2003) (holding that where "the BIA failed to consider all plausible and reasonable explanations for any inconsistencies," the adverse credibility finding was not supported by substantial evidence). Similarly, the Ninth Circuit was recently compelled to reverse the BIA because the IJ "picked at minor memory lapses and inconsistencies on issues at the periphery Kebede's asylum claim." *Kebede v. Ashcroft*, 366 F.3d 808, 811 (9th Cir. 2004) ("The IJ erroneously found that the difference between when Kebede recalled regaining consciousness after the assault and when Amanuel [Kebede's paternal grandmother] believed Kebede awoke was significant").

In affirming the IJ's adverse credibility determination, the Court of Appeals noted certain inconsistencies in "[t]he numbers and frequency of threatening calls; places he was located; how long he was in those places; and when the attack on his uncle took place." App., *infra*, 3a. To begin

with, it is important to note that the stated inconsistencies pertained to events which occurred from 1984 to 1988, 11 to 15 years ago, when the petitioner was asked to testify about them at his removal hearing in 1999. A.R. 000188.[3] Hence, it would be entirely reasonable and expected that, considering how long ago and the numerous times in which Mr. Hernandez and his family had to move around during those four years, he would have trouble remembering exactly how many times the terrorists called and at what specific locations. More importantly, however, these minor inconsistencies do not go to the heart of the petitioner's asylum claim.

Rather, the critical facts in support of the petitioner's asylum claim are: (1) that both he and his wife worked for the Supreme Court in Peru, A.R. 000156-58; (2) that the wife's uncle, Dr. Galvez Vega, was also working for the Supreme Court at the same time, and was involved in cases against terrorism at the time, A.R. 000158; (3) that he and his family did receive numerous threatening phone calls from various members of a terrorist organization over a period of four years, demanding that they convince the uncle to cease counter-terrorist efforts against their members, A.R. 000159-60, and that they should, instead, join them in their cause. A.R. 000162. The foregoing facts were amply corroborated by Mr. Hernandez's testimony, A.R. 156-209, the wife's testimony, A.R. 209-219, and Dr. Vega's declaration. A.R. 000301.

Similarly, exactly when the uncle was beaten at his own house by the terrorist members does not necessarily

---

[3] "A.R." refers to the Certified Administrative Record submitted to the Court of Appeals.

go to the heart of the petitioner's asylum claim. Mr. Hernandez testified that he could not remember exactly, but it probably occurred a short time after he and his family had fled Peru. A.R. 000205. Moreover, the wife also testified that the exact details of the attack were unclear to them because her family did not want to add tension to an already stressful situation by discussing it any further. A.R. 000214. Accordingly, the Court of Appeals erred in ignoring its own precedent regarding minor inconsistencies that do not go to the heart of an alien's asylum claim.

B. THE COURT OF APPEALS FAILED TO FOLLOW ITS OWN PRECEDENT, AND THEREBY ERRED, IN ITS FINDING THAT THE EVIDENCE SUPPORTS A DECISION THAT THE UNEXPLAINED IMPLAUSIBILITIES IN THE PETITIONER'S TESTIMONY INDICATE THAT HE WAS NOT CREDIBLE.

It is clear that "[s]peculation and conjecture cannot form the basis of an adverse credibility finding, which must be based on substantial evidence." *Shah v. INS*, 220 F.3d 1062, 1071 (9th Cir. 2000); *see also Gui v. INS*, 280 F.3d 1217, 1226 (9th Cir. 2002) (IJ's opinion "as to how best to silence a dissident" not a legitimate basis); *Lopez-Reyes v. INS*, 79 F.3d 908, 912 (9th Cir. 1996) ("personal conjecture about what guerillas likely would and would not do" not sufficient).

The Court of Appeals also relied upon certain "unexplained implausibilities" in affirming the IJ's adverse credibility determination, to wit: "[the petitioner's] refusal to report the threats or to seek or accept protection, and the failure of the 'terrorists' to make any significant

personal contact over a four year period when they tracked his phone numbers and were rebuffed by him each time they called." App. 3a.

Firstly, the petitioner's refusal to report the threats or accept protection is neither unexplained nor implausible. The petitioner testified that he feared reporting the problem to the authorities would make the situation worse for his family. A.R. 000162. This is a perfectly plausible explanation as any reasonable person would not want the situation to escalate from mere phone threats to unspeakable violence upon one's family. Considering how successful the terrorist group had been in tracking the family's efforts to relocate over the four years, from 1984-1988, it's reasonable to assume that their every move was carefully scrutinized by this shadowy organization. Hence, any visible efforts to seek protection from the authorities, e.g., accepting the uncle's offer to have guards in place to protect them, could be seen by the terrorist group as outright defiance of their demands, and, very possibly, invite lethal retribution in return. Furthermore, Mr. Hernandez testified that one of the judges who had advised him to leave the country was killed by terrorists at the Japanese Embassy in Peru. A.R. 000167-68. If the terrorists were able to get to a judge, what chances did his vulnerable family have against such a clandestine organization, even with protection from the authorities? Accordingly, the Court of Appeals has impliedly engaged in impermissible speculation and conjecture as to how the terrorist group operates and how the authorities in Peru respond to their actions.

Secondly, the Court of Appeals' finding that it was implausible that the terrorists failed "to make any significant personal contact" with the petitioners over a four-year

period of time also indulges in impermissible speculation and conjecture while ignoring evidence in the record. As Mr. Hernandez testified, he was once stopped and physically restrained and threatened at his place of work. A.R. 000169. Fortunately, because there was so much security around at the time, he was eventually let go. *Id.* In any event, the Court of Appeals articulated no basis, other than pure speculation and conjecture, in support of its conclusion that the terrorist group would prefer personal contact over making threatening phone calls in realizing their objectives. Accordingly, Court of Appeals has, yet again, engaged in the sort of speculation and conjecture specifically prohibited by precedent in its own circuit, *supra*, insofar as its conjecture as to what a terrorist group like the one threatening petitioners would or would not do under certain circumstances.

II. THE IJ VIOLATED PETITIONERS' RIGHTS TO DUE PROCESS UNDER THE FIFTH AMENDMENT IN FAILING TO ADVISE THEM OF THEIR APPARENT ELIGIBILITY FOR RELIEF UNDER THE CONVENTION AGAINST TORTURE.

A. THE IJ FAILED TO ADVISE THE PETITIONERS OF THEIR APPARENT ELIGIBILITY TO RELIEF UNDER THE CONVENTION AGAINST TORTURE.

Pursuant to regulations at the time of the petitioners' removal proceedings in 1999:

> *The immigration judge **shall inform** the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and **shall***

> ***afford*** *the alien an opportunity to make application during the hearing* [emphasis added].

8 C.F.R. § 240.11(a)(2) (1999).[4] The Ninth Circuit has repeatedly held this provision to be "mandatory." *See United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000); *United States v. Arce-Hernandez*, 163 F.3d 559, 563 (9th Cir. 1998). Accordingly, where the record, "fairly reviewed by an individual who is intimately familiar with the immigration laws – as IJs no doubt are – raises a ***reasonable possibility*** that the petitioner may be eligible for relief, the IJ must inform the alien of this possibility and give him the opportunity to develop the issue [emphasis added]." However, Immigration Judges "are not expected to be clairvoyant; the record before them must fairly raise the issue." *Id.* at 422.

Nevertheless, a failure to so inform the alien where it is appropriate constitutes a denial of due process under the Fifth Amendment, invalidating the underlying removal proceeding. *See Arrieta*, 224 F.3d at 1079. It is well established that all individuals in the United States – citizens and aliens alike – are protected by the Due Process Clause of the Constitution. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 77, 48 L. Ed. 2d 478, 96 S. Ct. 1883 (1976). The safeguards of due process will generally be afforded to both citizens and aliens against arbitrary federal or state action. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886); *Wong Wing v. United States*, 163 U.S. 228, 16 S. Ct. 977, 41 L. Ed. 140 (1896); *Truax v. Raich*, 239 U.S. 33, 36 S. Ct. 7, 60 L. Ed. 131 (1915); *Graham v.*

---

[4] While 8 C.F.R. § 240.11(a)(2) applied at the time of the petitioners' removal hearing, the regulation has since been replaced by 8 C.F.R. § 1240.49(a).

Richardson, 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971).

In the instant case, there is no indication that the IJ ever informed the petitioners of possible relief under the Convention Against Torture despite their apparent eligibility. Evidence in the record fairly established, at the very least, a reasonable possibility of the petitioners' eligibility for relief under the Convention.

To be eligible for withholding of removal under the Convention, the applicant must "establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2). The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. *Id.* "[C]ountry conditions alone can play a decisive role in granting relief under the Convention." *Kamalthas v. INS*, 251 F.3d 1279, 1280 (9th Cir. 2001) (holding that a negative credibility finding in an asylum does not preclude relief under the Convention, especially where documented country conditions information corroborated the "widespread practice of torture against Tamil males"). Furthermore, "[i]n assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, ***all*** evidence relevant to the possibility of future torture ***shall*** be considered [emphasis added]." 8 C.F.R. § 208.16(c)(3).

As discussed *supra*, the petitioners consistently and truthfully testified to having been the target of repeated death threats by a terrorist group, quite possibly because both were employed within the Peruvian Supreme Court along with their uncle, Dr. Vega, who was intimately involved with counter-terrorist efforts within the Peruvian

Supreme Court at the time. The petitioners also testified that their uncle was once beaten at his home sometime after they had left for the United States. The wife further testified that the last time her mother received a call from the terrorist group, she was warned that they do not forget, A.R. 000215. As a result, she and her husband fear being returned to Peru because members of the terrorist group will harm them. *Id.* Based on the foregoing, the petitioners have amply established a reasonable possibility of eligibility for relief under the Convention such that the IJ's failure to advise them of their apparent eligibility for such relief constitutes a violation of due process under the Fifth Amendment.

III. THE BOARD'S AFFIRMANCE, WITHOUT OPINION, OF THE IJ'S DECISION WAS UNCONSTITUTIONAL AND, IN THIS CASE, VIOLATED PETITIONERS' RIGHTS TO DUE PROCESS UNDER THE FIFTH AMENDMENT.

The Attorney General adopted the "affirmance without opinion" (hereinafter "AWO") procedure at issue in 1999. In lieu of the usual three-member review, an AWO allows for review of a case by a single Board member, who then affirms the IJ's decision, as in the instant case, with the statement, "The Board affirms, without opinion, the result of the decision below." 8 C.F.R. § 1003.1(a)(7)(iii). Unlike decisions rendered after review by a three-member panel, a single Board member decision rendered under 8 C.F.R. § 1003.1(e)(4) is prohibited from explaining his or her decision on the merits in an AWO. Moreover, the regulation defines an AWO as a Board approval of only the "result reached in the decision below." 8 C.F.R. § 1003.1(e)(4). The AWO does not "necessarily imply approval of all the reasoning" of the IJ's decision, although

it does signify the Board's conclusion that any errors were harmless or immaterial. *Id.* Accordingly, the Board member can issue an AWO only if he or she determines:

> *that the result reached in the decision under review was correct; that* ***any errors in the decision under review were harmless or nonmaterial; and*** *that (A) The issues on appeal are squarely controlled by existing Board or federal court precedent and* ***do not involve the application of precedent to a novel fact situation****; or (B) The* ***factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case*** [emphasis added].

Id.

In the first instance, the IJ's error in failing to advise the petitioners of their apparent eligibility for relief under the Convention was neither harmless nor nonmaterial because evidence in the record clearly demonstrate at least a reasonable possibility that they would be eligible, *supra*. The lives of 4 human beings are at stake here as the petitioners would essentially be returned to Peru where they would, more likely than not, be tortured or killed by the terrorist group that had been threatening them for four years, unless the IJ's error was corrected by the Board.

Moreover, the instant case does involve the application of precedent to a novel fact situation. The novel fact situation in the instant case requires review of the IJ's failure to advise the petitioners of their apparent eligibility for relief under the Convention, rather than the usual meritorious review of the IJ's determination of eligibility for such relief.

Finally, the factual and legal issues raised on appeal are sufficiently substantial that the instant case warrants the issuance of a written opinion. As discussed, the IJ's error implicates due process violations which may or may not be addressable by the Board depending on whether it found the error to be 1) procedural in nature and correctable by the Board, *e.g.*, through remand to the IJ for a hearing on the petitioners' CAT claims, or 2) constitutional in nature, and, for which the Board has no jurisdiction to adjudicate. *See Vargas v. U.S. Dept. of Immigration & Naturalization,* 831 F.2d 906, 908 (9th Cir. 1987). Upon deciding to use AWO in a particular case, the Board must be mindful that it not interfere with an alien's "right to a reasoned administrative decision" in doing so. *See* Executive Office of Immigration Review; Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56135, 56137 (1999). Consequently, the Board was not warranted in exercising AWO in the instant case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BRIAN D. LERNER
Counsel of Record
LAW OFFICES OF BRIAN D. LERNER
A PROFESSIONAL CORPORATION
249 East Ocean Blvd., Suite 408
Long Beach, California 90802
Telephone (562) 495-0554
Facsimile (562) 495-0519

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERTO DARIO HERNANDEZ GALICIA; GLADIS SONIA HERNANDEZ; KENNY ROBERT HERNANDEZ VIGIL; KEVIN JONATHAN HERNANDEZ VIGIL, Petitioners, v. JOHN ASHCROFT, Attorney General, Respondent.	No. 02-73259 Agency No. A70-786-068; A70-786-069; A70-786-070; A70-786-071 **MEMORANDUM*** (Filed Apr. 13, 2004)

On Petition for Review of an Order of the Board of Immigration Appeals

Submitted April 1, 2004**
Pasadena, California

Before: D.W. NELSON, FERNANDEZ, and KLEINFELD, Circuit Judges.

Roberto Hernandez Galicia, Gladis Sonia Hernandez, and their children, Kenny Robert Hernandez-Vigil and Jonathan Hernandez-Vigil, petition for review of the

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

Board of Immigration Appeals' denial of their applications for asylum and withholding of removal.[1] We deny the petitions.

The BIA's determination that an alien is not eligible for asylum must be upheld if "'supported by reasonable, substantial, and probative evidence on the record considered as a whole.'" *INS v. Elias-Zacarias*, 502 U.S. 478, 481, 112 S. Ct. 812, 815, 117 L. Ed. 2d 38 (1992) (citation omitted). "It can be reversed only if the evidence presented . . . was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed." *Id.* When an alien seeks to overturn the BIA's adverse determination, "he must show that the evidence he presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *Id.* at 483-84, 112 S. Ct. at 817; *see also Ghaly v. INS*, 58 F.3d 1425, 1429 (9th Cir. 1995). Credibility determinations are judged by the same basic standard. *See Gui v. INS*, 280 F.3d 1217, 1225 (9th Cir. 2002); *Cordon-Garcia v. INS*, 204 F.3d 985, 990 (9th Cir. 2000); *de Leon-Barrios v. INS*, 116 F.3d 391, 393 (9th Cir. 1997). In that area, however, we have added that the determination "'must be supported by a specific, cogent reason.'" *de Leon-Barrios*, 116 F.3d at 393 (citation omitted); *see also Gui*, 280 F.3d at 1225. Moreover, where an asylum claim is involved, an alien must show either past persecution or a well-founded fear of future persecution that is "both subjectively genuine and objectively

[1] The applications of Gladis Sonia Hernandez and the children are, essentially, derivative of Robert Hernandez Galicia's application. Because he is the lead petitioner, all references to Hernandez are to him. Moreover, what we hold as to him applies to them as well.

reasonable." *Fisher v. INS*, 79 F.3d 955, 960 (9th Cir. 1996) (en banc).

Here, Hernandez's claims fail. The IJ's decision was the final agency determination, and the IJ found that Hernandez was not credible. We are unable to say that the IJ's decision was not supported by substantial evidence in the record. On the contrary, the evidence supports a decision that the inconsistencies[2] and unexplained implausibilities[3] in his testimony indicate that he is not credible. Certainly, we cannot say that "no reasonable factfinder could fail to find" him credible. *Elias-Zacarias*, 502 U.S. at 484, 112 S. Ct. at 817; *see also Wang v. INS*, 352 F.3d 1250, 1259 (9th Cir. 2003) (a single supported ground for an adverse credibility finding is sufficient).[4]

Petitions DENIED.[5]

---

[2] *E.g.*, The numbers and frequency of threatening calls; places he was located; how long he was in those places; and when the attack on his uncle took place.

[3] *E.g.*, His refusal to report threats or to seek or accept protection, and the failure of the "terrorists" to make any significant personal contact over a four year period when they tracked his phone numbers and were rebuffed by him each time they called.

[4] Hernandez asserts that use of the streamlining regulation violates his due process rights. *See* 8 C.F.R. § 1003.1(a)(7) (formerly 8 C.F.R. § 3.1(a)(7)). We have already rejected that contention. *See Falcon Carriche v. Ashcroft*, 350 F.3d 845, 849-52 (9th Cir. 2003).

[5] Because Hernandez did not meet the eligibility requirements for asylum, he was not entitled to withholding of removal either. *See Ghaly*, 58 F.3d at 1429.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A70-786-068 – Los Angeles Date: Sep. 10, 2002

In re: HERNANDEZ GALICIA, ROBERT DARIO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: ZARATE, Gustavo A.

ON BEHALF OF SERVICE: Jeffrey C. Finnegan, Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(a)(7).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ [Illegible]
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A70-786-069 – Los Angeles Date: Sep. 10, 2002

In re: HERNANDEZ GLADIS SONIA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: ZARATE, Gustavo A.

ON BEHALF OF SERVICE: Jeffrey C. Finnegan,
Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(a)(7).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ [Illegible]
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A70-786-070 – Los Angeles Date: Sep. 10, 2002

In re: HERNANDEZ VIGIL, KENNY ROBERT

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: ZARATE, Gustavo A.

ON BEHALF OF SERVICE: Jeffrey C. Finnegan,
Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(a)(7).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions

granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ [Illegible]
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A70-786-071 – Los Angeles Date: Sep. 10, 2002

In re: HERNANDEZ VIGIL, KEVIN JONATHAN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: ZARATE, Gustavo A.

ON BEHALF OF SERVICE: Jeffrey C. Finnegan,
Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(a)(7).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the

statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ [Illegible]
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

Filed No.: A 70 786 068
70 786 069
70 786 070
70 786 071

July 7, 1999

In the Matters of ROBERTO DARIO HERNANDEZ GALICIA GLADYS SONIA HERNANDEZ VIGIL KENNY ROBERT HERNANDEZ VIGIL KEVIN JONATHAN HERNANDEZ VIGIL Respondents	)	IN REMOVAL PROCEEDINGS

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act

APPLICATIONS: Asylum, withholding of removal, voluntary departure

ON BEHALF OF RESPONDENTS:	ON BEHALF OF SERVICE:
Areg Kazaryan Attorney at Law	Elsa Martinez Jeffrey Finnegan Assistant District Counsels

ORAL DECISION AND ORDER
OF THE IMMIGRATION JUDGE

The male respondent is a 34-year old married male, native and citizen of Peru. The female respondent is a

42-year old married female, native and citizen of Peru. The two children, Kenny Hernandez and Kevin Hernandez, are 15 and 12 respectively. The United States Immigration and Naturalization Service (INS) has brought these removal proceedings against the respondent pursuant to the authority contained in Section 240 of the Immigration and Nationality Act (the Act). Proceedings were commenced with the filing of the Notice to Appear (NTA) with the Immigration Court. See Exhibit 1. The respondents admit as alleged in the Notice to Appear that they entered the United States on or about December 24, 1998, at or near San Ysidro, California. The respondents further concede that they are inadmissible as charged under Section 212(a)(6)(A) of the Act as aliens present in the United States without being admitted or paroled or who arrived in the United States at any time or place other than as designated by the Attorney General.

On the basis of the respondents' admissions, the Court finds the respondents' removability has been established.

The respondents declined to designate a country of removal and Peru was directed. The respondents applied for relief from removal in the form of asylum under Section 208(a) of the Act. Applications for asylum shall also be considered as applications for withholding of removal under Section 241(b)(3) of the Act. The respondents request voluntary departure under Section 240B(b) of the Act in the alternative.

The respondents in this case have satisfied the requirement of showing by clear and convincing evidence that they applied for asylum within one year of their last arrival. At the time of filing, the respondents were also

advised of the consequences of knowingly filing a frivolous application for asylum. See 8 C.F.R. Section 208.18.

The respondents' Form I-589, applications for asylum, is contained in the record as Exhibit 2. Prior to the hearing, the respondents had an opportunity to amend, supplement their application, and an amended declaration by the respondents was admitted into evidence as Exhibit 2-A. Additional documents were submitted in support of the respondents' applications, and they are as follows:

Exhibit 3 is a letter from the United States Embassy.

Exhibit 4, a group exhibit, consisting of supporting documents.

Exhibit 5 were supporting documents, which referred specifically to the female respondent, Gladys Hernandez.

Exhibit 6 was the Department of State *Profile* on Peru, dated June 1997.

Facts

The evidence at the hearing consisted of the respondents' written asylum application, the supplemental declaration, the testimony of the two adult respondents, the State Department *Profile*.

Written Application

In the written application, the respondents stated that they were seeking asylum on the grounds of membership in a particular social group and political opinion because the uncle of the wife was a judge who was investigating

terrorist cases in Peru. The respondents allege that if they returned to Peru, they could be killed.

In response to Question 3 on his application, the respondent listed himself and other family members as having been employed by the Supreme Justice Court or the Judicial Branch of the Supreme Court. The respondent stated that he was never arrested or detained or interrogated or convicted or sentenced or imprisoned. On or about December 24, 1988, the respondents left Peru, traveled through Mexico and arrived in the United States on or about December 24th, near San Ysidro, California.

Testimony

The male respondent testified as follows. He testified that he came to the United States on or about December 24, 1988, with his wife and two children. He testified that he worked for the Supreme Court. He was in charge of personnel at the Supreme Court, and part of his responsibilities was the planning and the scheduling of personnel. He testified that he began working in this position sometime in 1985, but he was not sure. He testified that he started out as an administrative technician one, and he was eventually promoted to the title of administrative technician two. He testified that he worked for the court approximately two and a half to three years. He testified that his wife worked for the Supreme Court in the Research Unit. He testified that he left Peru because starting in 1984, they received telephone calls from terrorist groups. He testified that in 1984, he was not yet working for the court, however, his wife was working for the court at that time. He testified that they received these calls because the uncle of the wife, one Dr. Vega, was the

President of the *Supreme Court of Peru*, and that as part of his responsibilities he was investigating cases involving terrorists. The respondent testified that they received their first threatening call around Christmas. The calls from the terrorists told the respondent to tell the uncle to stop investigating the cases involving terrorists. The respondent further testified that the calls began arriving every day at his home. He testified that the callers never named the terrorist group to which they belonged. The respondent testified that there were many terrorist cases before the Supreme Court at that time. The respondent further testified that he did not report these calls to the authorities. He testified that the calls became more often and the threats were made against him and his family. The respondent testified that he lived with his wife's family. He also testified that between 1984 and 1988, they received approximately 12 to 15 telephone calls from the terrorists. He testified that the terrorists warned the respondent to do something about the uncle. He testified that the terrorists also asked him to join with them. When asked how he knew that these phone calls were coming from terrorists, the respondent testified that he knew they were terrorists because at the time they were making the threats to the uncle, the uncle was handling terrorist cases. The respondent testified that he told the uncle about the calls, but never reported these phone calls to the authorities because he thought that the situation would get worse. He testified that the uncle offered to protect the family with guards, however, the respondent refused, saying that the guards would make the situation worse. The respondent testified that he and his family moved away from the home of the mother-in-law, who was at that time living in Lima, and they moved to a house belonging to the wife's aunt, also in Lima. This was sometime in

1985. The respondent testified that they lived with the aunt for approximately six months. He testified that while living at the aunt's home they still received calls from the terrorists. The respondent testified that he did not know how the terrorists knew that they had moved from the mother's house to the house of the aunt. They, then left the aunt's house. The family moved from the aunt's house to the home of the wife's sister, who also lived in Lima. They stayed at the sister's house for approximately three months. They testified that they continued to receive telephone calls at this home as well, and the threats became worse. He testified that they then left the sister's house and went to live with a friend, and he stayed with the friend, who also lived in Lima, for approximately three months. This was still in 1986. He testified that while living at the friend's house, he received one call. He then testified that they moved back to his own home and then they remained at his own home for approximately one month and they received approximately two calls during this one-month period. He testified that after that, they moved in with another aunt, who lived in Lima, and they stayed there somewhere approximately six months, and that they received more calls while living at the aunt's house. The respondent did not recall the name of the aunt, but he said that the last name was Vega.

The respondents then testified that after receiving these calls, they decided to leave Peru and that they began preparing papers for the family to move to the United States. While doing that, they moved in with another friend sometime in 1987. The respondent testified that they stayed with this friend for approximately an entire year. He testified on direct that he did not receive phone calls during that year when he stayed with the friends.

The respondent also testified that he consulted with judges in the Supreme Court and explained the situation to these judges, that is the situation of the phone calls. He testified that these judges told him to leave the country. He testified that he spoke to two judges, one of whom was later killed during a bombing at the Japanese Embassy in Peru. The respondent could not recall the name of this judge. He testified that the other judge was Giusti Acuna. He testified that this judge also died. He testified that these are the two judges that advised him to leave the country. The respondent then testified that at some point they returned to live with the mother-in-law and they remained in the mother-in-law's house until they left the country. This was sometime in 1987 that they returned to live with the mother-in-law. The respondent testified that they left Peru because they were afraid that they would be killed or something would happen to them. The respondent also testified that one time he was stopped in the palace, the courts where he worked, he was stopped on the stairs by terrorists. He testified that they couldn't do much to him because everyone was watching. He testified that this was sometime in 1986, and that the strangers told him that they were part of the terrorist group. He testified that they wanted the respondent to have the same ideas that they held. The respondent testified that he didn't know what ideas the terrorists had. He testified that this was an encounter with two terrorists. He also testified that he did not inform the authorities of this encounter. He testified that this was the only encounter of that nature.

He testified that he wasn't sure if the uncle, who was the president of the court, ever received any threats, any telephone calls. He testified that the uncle is alive today.

He's living in Peru, that he is paralyzed in a wheelchair, and that his health is not good. He testified that the uncle's illness began when they entered his house. He testified that the uncle no longer works in the court. He testified that after he and his family left Peru, they contacted the family and learned that the family was continuing to receive phone calls. He testified that the terrorists were continuing to telephone his home because they knew that one day the respondent would come back to Peru. He testified that the last phone calls that the family received were in 1993. He testified that he doesn't know if any phone calls were made after 1993. He testified that the father-in-law became ill because he was worried about the respondent and his family.

On cross-examination, the respondent testified that he uses the term Palace and Supreme Court interchangeably. He was referred to the same building. The respondent also testified that during the time period where he received all of these telephone calls, he continued working at the court and continued working on the same shift, that he never changed shifts. The respondent's testimony changed during the cross-examination. For example, he testified on direct that when he went to live in his friend's house for three months, he received one call. On cross-examination, he testified that he received two or three calls. He testified that when he left his friend's house, he did not return to his own home, that he returned to the home of his in-laws. He also testified that when he went to live with his friend, Mariano, that he did not live there an entire year; he stayed for two months or less. And then he corrected himself by saying that he did receive phone calls while living with his friend Mariano. On direct examination he said he did not receive calls. On cross-examination, he

testified that he received five calls. He testified on cross-examination that he tried to obtain a visa to come to the United States from the American Embassy. However, the Embassy refused to give us a visa. He testified that he applied for a visa in 1988. When asked why there was no mention of the face-to-face encounter with the terrorists on the stairways in the courthouse, why there was no mention of this in either his asylum application or his supplemental declaration, the respondent testified that this was not important, that he only included important activities or important events in his application. The respondent submitted a letter from the uncle, who was the President of the Supreme Court. The uncle's name was Jose Mario Galvez-Vega. He became a justice in 1981. In this letter, which is in Group Exhibit 4, the uncle indicates that his nephew and his niece received phone calls from terrorists and that they had to move because of these phone calls. They had to move frequently from one place to another. The respondent had testified on direct examination that the terrorists had visited the uncle's house and confronted the uncle in his house. He testified that the terrorists went to his uncle's house sometime between 1984 and 1985. He said that they threatened the uncle and they beat him. He testified that this happened while he was still in Peru. The trial attorney questioned the respondent with respect to the letter written by the uncle, and asked the respondent why the uncle had omitted this incident in his letter, and the respondent testified that he only asked his uncle to provide him with evidence, and that was why the uncle omitted the fact that the terrorists had entered the uncle's house and had beaten and threatened him. Later in his testimony, the respondent testified that this incident at the uncle's house occurred when the respondent was in the United States.

The respondent testified that they did not attempt to relocate internally in Peru. They did not want to leave Lima, Peru, because they did not want to live somewhere where they didn't know anyone; that they did not want to live in an unknown place, so they stayed within Lima, Peru. The respondent testified that he and his wife have family members who live outside of Lima, however, again, he did not want to leave Lima, because he did not want to live in an unknown place. They feared living in an unknown place. The respondent testified that at some point he received psychiatric therapy in Peru. He testified that he needed this treatment in order to be calmed down because he and his family were afraid all of the time. He testified going back to the incident on the stairs that the terrorists also said to him that he should tell his uncle to stop harassing prisoners. At this point in the testimony, the respondent said that the terrorists had confronted his uncle while he was in Peru. The respondent testified that he was never able to determine who was making the telephone calls because the telephone calls were from different people and he could tell that because of the different voices on the phone. He was not sure whether the phone calls were being made by members of the Shining Path or members of the terrorist group Tupac Amaru. The respondent testified that in 1993, the terrorists telephoned his attorney, and that he learned about this phone call from his mother-in-law because at that time the respondents were in the United States.

The respondent testified on cross that he did not think he would be able to return to his position at the court if he had to return to Peru. He testified that it would probably be too difficult to return to work at the court and he testified that the same thing applied to his wife. He

testified that the uncle was now retired. He testified that the state had not been able to do anything about the terrorists. He testified that his in-laws still live in Peru. He also testified that the uncle, the President of the Supreme Court, had three children, and that he thought that one of them lived in Peru.

The wife testified as follows. The wife testified that she was a secretary at the court for approximately six years. She testified that her uncle joined the court in 1981 and that she began working there in 1983; that she worked for the Judicial Investigation Branch. She testified that she worked for the Supreme Court from 1984 up until the time that she left Peru to come to the United States. She testified that the family received approximately 12 to 15 calls, and that the family lived in four different locations and that they received phone calls in these various locations. She testified that her uncle retired from the court sometime between 1989 and 1990, and she testified that she wasn't sure what year the terrorists went to the uncle's house, but she does know that he was beaten. She testified that she had never had any personal contact with the terrorists. She testified that during the last phone call to her mother, the terrorists said that they would never forget. She testified that the terrorists were angry that she and her family had not joined their ideas. She testified that she thinks, "I think they are against the government." She testified that the terrorists wanted her and her husband to get involved with them, but she did not hold the same ideas. She testified that she thought if they didn't join the family would be harmed. She testified that she stopped working approximately three months before departing for the United States. The male respondent

testified that he stopped working approximately one year before his departure from Peru, that he took a six-month leave of absence from his employment and then extended the leave for an additional six months. So that for approximately one year before arriving in the United States he was on leave from his position with the court.

Statement of the Law

The burden of the proof is on the respondent to establish that he or she is eligible for asylum or withholding of removal.

To qualify for withholding of removal under Section 241(b)(3) of the Act, the respondent's facts must show a clear probability that his life or freedom would be threatened in the country directed for removal on account of race, religion, nationality, membership in a particular social group or political opinion. This means that the respondent's facts must establish it is more likely than not that he would be subject to persecution for one of the grounds specified. See *INS v. Stevic*, 467 U.S. 407 (1984).

To qualify for asylum pursuant to Section 208 of the Act, the respondent must show that he is a refugee within the meaning of Section 101(a)(42)(A) of the Act. See Section 208(a) of the Act. The definition of refugee includes a requirement that the respondent demonstrate either that he suffered past persecution or that he has a well-founded fear of future persecution in his country of nationality or last habitual residence on account of race, religion, nationality, membership in a particular social group or political opinion. The alien must show he has a subjective fear of persecution and that the fear has an objective basis. The objective basis of a well-founded fear

of future persecution is descried in the regulations as a reasonable possibility of actually suffering such persecution if the alien were to return to his home country. See 8 C.F.R. 208.13(b)(2). The objective component must be supported by credible, direct and specific evidence in the record. *Duval v. INS*, 901 F.2d 787 (9th Cir. 1990). The alien must also be both unable and unwilling to return to or avail himself of the protection of his home country because of such fear. Finally, an applicant must also establish that he merits asylum in the exercise of discretion. See *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987).

The regulations also note with respect to past persecution that an alien who establishes he suffered past persecution within the meaning of the Act shall be presumed also to have a well-founded fear of future persecution. The presumption may be rebutted if a preponderance of the evidence establishes that since the time the persecution occurred conditions in the applicant's home country have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he were to return. An alien who establishes past persecution, but not ultimately a well-founded fear of future persecution will be denied asylum unless there are compelling reasons for not returning him, which arise out of the severity of the past persecution. 8 C.F.R. Section 208.13(b)(1). See also *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989).

The well-founded fear standard required for asylum is more generous than the clear probability standard of withholding of removal. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). We first, therefore, apply the more liberal well-founded fear standard when reviewing the respondent's application, because if he fails to meet this test it follows

that he necessarily would fail to meet the clear probability test required for withholding of removal.

In reviewing the respondent's application, the Court must consider the credibility of the respondent. The testimony of an applicant for asylum may, in some cases, be the only evidence available, and it can suffice where the testimony is believable, consistent and sufficiently detailed in light of general conditions in the home country to provide a plausible and coherent account of the basis for the alleged fear. See *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989); 8 C.F.R. 208.13(a). Such is particularly true in the case of an alien who fled his country quickly or who could not carry such evidence or could not now obtain such evidence without further endangering himself or his family. An applicant in general is well advised, however, that corroborating materials should not be considered merely superfluous or optional. See *Matter of S-M-J-*, Int. Dec. 3303 (BIA 1997). See also *Matter of Dass*, 20 I&N Dec. 120 (BIA 1999).

An Immigration Judge's finding regarding the credibility of a witness is ordinarily given significant deference since the judge is in the best position to observe the witness' demeanor. See *Matter of A-S-*, Int. Dec. 3336 (BIA 1998). *Matter of Boromand*, 17 I&N Dec. 450 (BIA 1990). An adverse credibility finding can be based on inconsistent statements and fraudulent documents. See *Matter of O-D-*, Int. Dec. 3334 (BIA 1998). See also *Leon-Barrios v. INS*, 116 F.3d 391 (9th Cir. 1997).

Findings of the Court

The Court finds the testimony regarding employment with the Supreme Court, the Court finds that the

respondents are credible with respect to their former employment. The respondents submitted a letter from the uncle, who was the President of the Supreme Court. Unfortunately, the uncle was not here to be cross-examined by the Service. The letter written by the uncle basically stated the same information that the respondents indicated in their testimony, that is that they received numerous phone calls from a terrorist group and that was the basis for their departure from Peru. However, the Court makes the following findings:

Onē, the main person in this case that is the purpose of these phone calls was because of the position of the uncle in the Supreme Court. It should be noted that the uncle had three children of his own, three immediate family members. The respondents were related to the uncle through law. That is the male respondent was married to the niece of the uncle. There was no testimony regarding threats made to the uncle's immediate family or any threats made directly to the uncle in terms of phone calls the uncle in his letter indicated that the nephew and his wife had received phone calls, however, the uncle never mentioned the incident allegedly in his own home whereby terrorists entered his home, beat him and threatened him. There was no mention of this in his letter. And the respondent's explanation for its omission, the court found illogical, that is he said that he told the uncle to show evidence and that is why the uncle omitted such an important fact such as basically a home invasion. The respondent may argue that he worked for the court and that's why they were subject to these phone calls. However, it would be more logical to threaten immediate family members who would have more persuasive powers over their father than the nephew, who was related to the uncle

through marriage. So the Court finds that explanation suspect. The Court also notes that there was no mention of the face-to-face encounter in the asylum application filed by the respondent. Very often the asylum application does not contain all of the information that a respondent needs to offer. However, the respondent then submitted a very detailed supplementary declaration. And again in this supplementary declaration, there was no mention of a face-to-face encounter at his work place with these terrorists. The respondent said that this was not an important incident. The respondent wants the Court to believe that anonymous phone calls over a period of four years from people who never identified themselves was more traumatic than a face-to-face encounter with terrorists at his work place. The Court finds this omission of this face-to-face encounter extremely crucial in determining the respondent's credibility. With respect to the terrorists, the respondent testified that these unknown people wanted him to join with their ideas. The Court finds it strange then that these unknown people never identified themselves or even told the respondent what ideas they want him to embrace. It seems illogical that a group of people would telephone someone for four years trying to get them to join their organization without ever mentioning the name of the organization or what the organization stood for. This seems totally illogical. There were inconsistencies that went to the heart of the claim with respect to the number of phone calls received and where these phone calls were received. On direct examination at one point the respondent testified that he lived with a friend for an entire year and he received no phone calls. On cross-examination, he testified that he lived for a shorter period of time, and during that shorter period of time he received somewhere between 3 and 5 phone calls. The respondent

testified at one point that he lived with his wife's aunt for six months, but could not recall the name of the aunt. He testified that two judges advised him to leave Peru. Conveniently, he testified that both of these judges were now deceased, and that he did not know the name of one of the judges who advised him to leave Peru. The Court also finds it strange that the respondent would never report any of these phone calls to authorities. He also testified that he refused the assistance of any guards. This is not logical. For someone to receive phone calls for four years, to think that it would make it worse if these calls were reported to the authorities, it's not a logical conclusion. Additionally, the respondent received phone calls for four years. These terrorists apparently knew where he was located, because wherever he moved, they seemed to be able to find him. And yet, they never physically harmed him, even when they showed up, allegedly, at his work place. They called him for four years. They never went to his home. They never confronted him on the street. Phone calls over a four-year period seems to be the extent of the threat that he appeared to receive, and even then, the number of phone calls and the locations of these phone calls changed from the direct examination to the cross-examination. It was also curious again, going back to the terrorist phone calls, he testified that [text missing] wanted him to support them. It would seem illogical then for [text missing] to call you and ask for your support without identifying [text missing] and expressing exactly how they wanted you to support [text missing] were that interested in getting his support, it seems that they would certainly identify themselves. It is not clear to the Court why the respondent stopped working one year before his departure from Peru. It is not clear if he received psychiatric treatment. He did not present any evidence to that

effect. He also failed to produce any evidence to show that his uncle's illness was the result of the terrorists entering his house and threatening and beating him. Again, the omission of the uncle [sic] description of that incident makes that incident highly suspect, and it appears to the Court that such an incident never occurred, that is terrorists entering the home of the uncle. The respondent has testified that the last phone call was received in 1993. That's approximately six years ago. The Court does not understand why the people, if they were in fact making those phone calls, would be interested in the respondent at this stage, and, therefore, the Court does not see how the return of the respondent to Peru would subject him to future persecution, especially when the Court finds that the respondent did not suffer past persecution and that the inconsistencies in the respondent's testimony go to the heart of his claim and, therefore, the Court does not find that the respondent's testimony was credible. Therefore, the Court finds that the respondent has failed to meet his buren [sic] of showing that he suffered past persecution in Peru based on any of the five statutory grounds. The respondent has also failed to demonstrate to the Court that he would suffer future persecution should he be returned to Peru on any of the five statutory grounds. The respondent and his family have been out of Peru for the past ten years. And considering that he does not know who was making these phone calls, he doesn't know if these people are still in Peru or if they are still interested in him. Therefore, because of the inconsistencies, because of some of the illogical statements made by the respondent, the Court finds that in the discretionary matter the respondent is not deserving of the relief of political asylum because the Court does not find his testimony credible. With respect to the testimony of the wife, the Court finds

that the testimony of the wife did not show that the respondents have suffered past persecution or that they would be faced or suffer future persecution upon their return to Peru. Inasmuch as the respondent has failed to satisfy the lower burden of proof required for asylum, it necessarily follows that he has failed to satisfy the more stringent clear probability of persecution standard required for withholding of removal.

Voluntary Departure

Pending before this Court is also the respondents' request to depart the United States without expense to the Government in lieu of removal pursuant to Section 240B(b) of the Act. To qualify for voluntary departure, the respondent must establish that he has been physically present in the United States for a period of at least one year immediately preceding the date the NTA was served, he is and has been a person of good moral character for at least five years immediately preceding such application, that he is not deportable under Section 237(a)(2)(A)(iii) or 237(a)(4) of the Act; he establishes by clear and convincing evidence that he has the means to depart the United States and intends to do so; and he shall be required to post a voluntary departure bond. In addition, the respondent must be in possession of a travel document that will assure his lawful reentry into his home country.

Discretionary consideration of an application for voluntary departure involves a weighing of factors, including the respondent's prior immigration history, the length of his residence in the United States and the extent of his family business and societal ties in the United States.

The respondent testified that he has never been arrested or convicted of any crime. He has never been deported or granted voluntary departure by the United States Government. He testified that he will abide by the Court's order and depart the United States when and as required, has the financial means to depart the United States without expense to the Government, and will only return to the United States by lawful means.

The Court finds that both respondents are eligible for this minimal form of relief that is voluntary departure and therefore will be granted this form of relief. The Court finds that they are both statutorily eligible and deserving of the relief of voluntary departure.

Therefore, the following order shall issue:

ORDERS

IT IS HEREBY ORDERED that the respondent's application in the matter of Roberto D. Hernandez be denied.

IT IS HEREBY ORDERED that the application for political asylum in the matter of Gladys Hernandez be denied.

IT IS HEREBY ORDERED that the respondent's application for withholding of removal for both Roberto D. Hernandez and Gladys Hernandez be denied.

IT IS HEREBY ORDERED that the respondents' be granted voluntary departure in lieu of removal and without expense to the United States Government on or before September 7, 1999.

IT IS FURTHER ORDERED that the respondents shall post a voluntary departure bond in the amount of $500 each with the Immigration and Naturalization Service on or before July 14, 1999.

IT IS FURTHER ORDERED that if required by the INS, the respondents shall present to the INS all necessary travel documents for voluntary departure within 60 days.

IT IS FURTHER ORDERED that if the respondents fail to comply with any of the above orders, the voluntary departure order shall, without further notice or proceedings vacate the next day and the respondents shall be removed from the United States to Peru on the charge contained in the Notice to Appear.

This is a warning to the respondents. Faille to depart as required means you could be deported. You may have to pay a civil penalty of $1,000 to $5,000, and you would become ineligible for voluntary departure, cancellation of removal, and any change or adjustment of status for ten years to come. Also, if you fail to depart as required and then fail to comply with the removal order, you could also be fined $500 a day for noncompliance. See Section 274(d) of the Act.

ROSALIND K. MALLOY
U.S. Immigration Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT DARIO HERNANDEZ GALICIA; GLADIS SONIA HERNANDEZ; KENNY ROBERT HERNANDEZ VIGIL; KEVIN JONATHAN HERNANDEZ VIGIL,	No. 02-73259 Agency No. A70-786-068; A70-786-069; A70-786-070; A70-786-071
Petitioners,	ORDER DENYING PETITION FOR REHEARING
v.	(Filed Jun. 9, 2004)
JOHN ASHCROFT, Attorney General,	
Respondent.	

Before: D.W. NELSON, FERNANDEZ, and KLEINFELD, Circuit Judges.

The petition for rehearing is DENIED.

Pursuant to *Desta v. Ashcroft*, 365 F.3d 741 (2004), petitioners' motion for stay of removal included a timely request for stay of voluntary departure. Because the motion for stay of removal was granted, the voluntary departure period was also stayed, *nunc pro tunc*, to the filing of the motion for stay of removal and this stay will expire upon issuance of the mandate.